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Supreme Court, U.S.
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In the Supreme Court of the United States

BETHANY VICTORIA BOWEN,
Petitioner

v.

HON. JEFFRE CHEUVRONT, IN HIS OFFICIAL CAPACITY AS JUSTICE OF THE DISTRICT COURT FOR THE STATE OF NEBRASKA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether it violates the First Amendment and interferes with the due administration of justice for a state court judge to order a rape victim not to use certain words, including "rape", "victim" and "assailant", during her descriptive trial testimony?

II. Whether *Younger/Samuels* abstention bars Petitioner's claims even though she was a non-party to the criminal proceeding and there was no adequate state remedy?

PARTIES TO THE PROCEEDINGS

Petitioner Bethany Victoria Bowen, is a citizen crime victim. Respondent Jeffre Cheuvront is a Justice of the District Court from the state of Nebraska.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bethany Victoria Bowen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The per curiam decision of the Eighth Circuit Court of Appeals dismissing Petitioner's appeal is reprinted at App.B.3a-5a and is published at 521 F.3d 860 (8th Cir. 2008). The decision of the Eighth Circuit denying rehearing and rehearing en banc is reprinted at App. A, 1a-2a and is not otherwise published. The memorandum and order of the United States District Court for the District of Nebraska (per Kopf, J.) dismissing Petitioner's federal claims is reprinted at App. D.8a-29a. The memorandum and show cause order of the United States District Court for the District of Nebraska (per Kopf, J.) is reprinted at App.E.30a-34a and has not otherwise been published. The memorandum and order of the United States District Court for the District of Nebraska denying Petitioner's Motion for Reconsideration is reprinted at App.C.28a-29a and is not otherwise published.

JURISDICTION

The Eighth Circuit rendered its decision on April 3, 2008 and denied rehearing and rehearing en banc on May 16, 2008. A formal mandate issued on May 23, 2008. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . .

Title 42, Section 1983 of the United States Code provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT

This case represents a serious and growing problem in state criminal trials; one that undermines the due administration of justice and interferes with important First Amendment rights, yet systematically evades judicial review.

Each of the courts below has declined to answer the question presented: whether a state court judge has constitutional authority to censor the descriptive testimony of a percipient lay witness to her own victimization such that a rape victim can be ordered not to use the words "rape", "victim", "assailant", "sexual assault kit", and "sexual assault nurse examiner" during a criminal rape trial?

Similar censorship orders in all types of criminal cases have drawn the attention and deep concern of prosecutors across the country because of their increasing frequency and because of the impact of such orders on the integrity of the truth-finding function. As the North Dakota State's Attorneys Association (NDSAA) wrote in an amicus brief submitted to the District Court below: "... juror perceptions of key prosecution witnesses are systematically biased when word restrictions are in place, to the detriment of the administration of justice."

Vice-President of the National District Attorneys' Association Joshua Marquis likewise recently observed that the practice is "absurd, it's dangerous and it's growing", while NDAA President James Fox described such orders as "a travesty to our criminal justice system", National Law Journal, "Courts Putting 'Hot Button' Words On Ice", June 16, 2008, that "strips prosecutors of their ability to make a case". ABC.com,

"Courts Increasingly Ban Inflammatory Words; 'Rape' Becomes 'Intercourse'", July 1, 2008.

By not ruling on the merits, the lower courts have left in tact a state court order that not only undermines the integrity of the criminal justice system, but also conflicts with a decision of this Court, written over a hundred years ago, recognizing as "essential to the impartial and efficient administration of justice in the tribunals of the nation, that witnesses should be able to testify freely before them, unrestrained by legislation of the State, or by fear of punishment in the state courts." *Loney's Case*, 134 U. S. 372, 375 (1890).

The state court order also infringes on Petitioner's First Amendment right to testify fully and truthfully; an issue not addressed below yet clearly disturbing enough to provoke the District Court to observe that such orders run counter to the core values of a democracy. Nebraska Federal District Court Judge Richard Kopf wrote, "there is something profoundly disturbing about a judge telling a citizen that she cannot say she was raped when testifying as a victim in a criminal case, particularly when the victim is presumably trying to do nothing more than describe what happened to her. This brings to mind the blue burkas of a distant place. See Asne Seierstad, *The Bookseller of Kabul* (Back Bay Books, 2004)". (App. E., 32a, n.2).

Without review by this Court, such orders will likely become even more commonplace, and yet evade federal judicial review and oversight for two main reasons. First, as was the case below, prosecutors typically lack procedural authority to seek interlocutory review of court-ordered language

restrictions. Second, even if prosecutorial appeals were possible, states lack standing to represent the personal constitutional rights of lay witnesses, such as the First Amendment right to testify fully and truthfully, and the concomitant right of Due Process.

Even the District Court acknowledged the difficulty of a lay witness obtaining judicial review of an unlawful order as that Court said that Petitioner had only one avenue of redress: She could disobey the court by using a forbidden word during her testimony, then suffer a contempt adjudication mid-trial, from which she could seek a direct appeal. (App. D., 25a, n.10). This option is not only highly impractical; it is, as argued below, unconstitutional.

Requiring a mid-trial contempt adjudication as a necessary prerequisite to review is also burdensome on the criminal justice system and on blameless citizens who are typically not represented by private counsel, and yet are duty-bound to participate in criminal trials.

The very fear of a contempt judgment chills the ability to testify freely and undermines the truth-finding function as the NDSAA argued below: "If witnesses and victims must testify under threat of contempt for testifying truthfully in their own language, they will be less inclined to come forward and cooperate with the prosecution...and the work of prosecutors will be impeded."

Few courts have addressed restrictions on the language of government actors, such as prosecutors, police and judges. But even in states where restraining the words of state agents has been upheld, those cases nowhere authorize (nor could they)

language restrictions on the testimony of lay witnesses as a proper encroachment on First Amendment rights.

While it is beyond dispute that courts can exclude whole categories of substantive evidence as when probative value is outweighed by unfair prejudice, this doctrine has no application such that indisputably relevant and admissible evidence can be linguistically manipulated to prevent the subjectively honest testimony of a witness describing a firsthand experience.

The right to testify fully and truthfully is fundamental, as is the need for unrestrained and robust testimony from all lay witnesses in a judicial proceeding where human beings must determine truth by judging the credibility of other human beings. Language choice, like demeanor, consistency, tone of voice and candor, informs the fact-finding process. For example, a witness who uses hyperbole has a worse chance of being believed than one who states the facts in less exaggerated terms. Aside from the practical problems associated with censorship orders, (is there a limit to how many words can be forbidden?, should a victim carry a list with her and consult it during her testimony?, etc.) jurors simply cannot determine truth when percipient witnesses are commanded to use only certain government-mandated words to describe their personal experience.

This case is presented in an unusual procedural posture, unlikely to be repeated and thus ideal for review by this Court. The order at issue was lodged against Petitioner in connection with a past criminal trial that ended in a mistrial, and was re-issued to apply at a future retrial. In short, the claims are both ripe and not moot because they rest on "chilling effect"

injuries, as well as past actual injuries worthy of redress and not otherwise subject to judicial review in state court.

Because the prosecutor withdrew the charges without prejudice while Petitioner's federal appeal was pending, this case can be reviewed in due course as there is no longer any concern that an appeal might undermine the speedy trial rights of the accused.

Prior Proceedings

On February 3, 2005, Pamir Safi was bound over in Nebraska state court and charged with the October 31, 2004 rape of Petitioner Bethany Victoria Bowen. Safi had been arrested twice previously for the same crime.

In November 2006, just prior to the start of the criminal trial, the state court granted a defense motion in limine seeking to compel Petitioner to refrain from using the words "rape", "victim" and "assailant". Petitioner was further ordered not to use the phrase "sexual assault" when referencing forensic evidence involving the "Sexual Assault Nurse Examiner" and the "Sexual Assault Kit". (App. H., 39a-41a).

The prosecution objected to these orders and considered filing an appeal but determined that the state lacked procedural authority to seek interlocutory judicial review from a ruling on a motion in limine. The jury was not made aware of the court's order. Petitioner did her best to comply with the order during trial. On November 6, 2006, the case ended in a mistrial after the jury failed to reach a verdict.

Prior to the start of the second trial in July 2007, a similar order was issued along with a proposed

contract that petitioner was to sign, acknowledging the court's language ban and possible sanctions in the event of her noncompliance. (App. H., 39a-41a). A prosecution motion to forbid use of the words "sex" and "intercourse" was denied. (App. G., 36a-38a).

Petitioner retained private counsel to file an independent Motion for Reconsideration because the state lacked standing to assert Petitioner's personal and constitutional rights. When the trial court declined to rule on her pleadings, Petitioner also sought relief via special writ proceedings before the Nebraska Supreme Court, which was summarily denied.

On July 11, 2007, the trial court initiated a hearing apparently to determine whether Petitioner intended to comply with the court's order during trial. Petitioner's lead counsel had returned to Boston after the state court declined for more than two days to consider or rule on her Motion for Reconsideration. New local counsel was retained and had approximately 20 minutes to prepare before the proceeding began.

The state court informed Petitioner that if she did not comply with the language order, she could be held in contempt and incarcerated. Petitioner explained that she understood the court's order but could not take an oath and then use words that did not honestly convey the truth of her experience.

The trial judge stated that the defendant's rights "trump" free speech, yet he cited no data, research or case law in support of its ruling and failed to explain how the word "rape" undermines any constitutional rights. The following day, before a jury was selected, the judge granted a second mistrial motion, ruling the

defendant could not get a fair trial because of pretrial publicity.

In August 2007, the prosecutor announced that he would proceed with a third trial in early 2008.

On September 6, 2007 Petitioner filed a §1983 action in Nebraska Federal District Court seeking only declaratory relief from the state court's order. The complaint sought redress for past injuries from the first trial, as well as "chilling effect" injuries related to the future retrial.

On September 10, 2007 the District Court issued an order under Rule 11 requiring Petitioner to show cause "why the Court should not conclude that (a) the [above-captioned] complaint was filed for an improper purpose and (b) the claims and legal contentions set forth in the complaint are not warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law".[1] (App. E., 30a-34a).

On September 18, 2007 Petitioner filed a responsive brief primarily advancing the basic factual and legal bases for her complaint, and addressing the unprecedented nature of the First Amendment issues as well as the absence of precedent supporting the state court's order.

On September 25, 2007 the District Court ruled the complaint should be dismissed and sanctions (later

[1]1 The Court also ruled that the defendant state court judge would not be required to respond until a determination was made regarding the Rule 11 issue. Out of respect for this determination, although Petitioner had timely served her complaint on the judge, the return was not filed with the District Court. The return has since been submitted and is on file with the District Court.

vacated) should issue against Plaintiff's counsel. This ruling did not address the merits of Petitioner's free speech claims, but rested instead on a patchwork of procedural and jurisdictional concerns related to standing and federal abstention. (App.D., 8a-29a).

On October 10, 2007 Petitioner filed a Motion for Reconsideration more fully addressing why abstention and other jurisdictional doctrines did not bar Petitioner's claims. This Motion was denied. (App.C., 6a-7a).

On October 23, 2007 Petitioner filed a timely appeal to the 8th Circuit Court of Appeals.

In early 2008, the prosecutor began the process of jury selection and notified Petitioner of the likely trial schedule. Shortly thereafter, the prosecutor advised Petitioner that he would not proceed with a third trial and criminal charges were withdrawn without prejudice. Petitioner notified the 8th Circuit Court of those developments on January 14, 2008.

A panel of the 8th Circuit ruled on April 3, 2008 that Petitioner's §1983 complaint should be dismissed as moot in light of the resolution of the underlying criminal charges. (App.B., 3a-5a).

A petition for rehearing and rehearing en banc was filed on April 23, 2008 and denied on May 16, 2008. (App.A., 1a).

The 8th Circuit issued its formal mandate on May 23, 2008. (App.A., 2a).

REASONS FOR GRANTING THE WRIT

I. THE NORTH DAKOTA STATE'S ATTORNEYS ASSOCIATION (AMICUS BELOW) AND THE NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, HAVE EXPRESSED SERIOUS CONCERN THAT JUDICIAL CENSORSHIP OF THE DESCRIPTIVE TESTIMONY OF LAY WITNESSES IS A GROWING AND SIGNIFICANT PROBLEM THAT UNDERMINES THE TRUTH-FINDING FUNCTION YET SYSTEMATICALLY EVADES REVIEW

After learning that Petitioner was ordered not to use the words "rape", "victim" and "assailant", or the phrases "sexual assault kit" and "sexual assault nurse examiner", prosecutors nationwide expressed serious concern, declaring that the practice is occurring with increasing frequency and "strips prosecutors of their ability to make a case". *Courts Increasingly Ban Inflammatory Words; 'Rape' Becomes 'Intercourse'*, ABC.com., July 1 2008, citing Joshua Marquis, Vice-President of the National District Attorneys' Association (NDAA). Mr. Marquis described the practice as "dangerous and it's growing". *Id.* NDAA President James Fox recently described such orders as "a travesty to our criminal justice system". *Courts Putting 'Hot Button' Words On Ice*, National Law Journal, June 16 2008.

In this case, the order banning certain language was so broad-sweeping, Petitioner was disallowed even to testify that she told medical and law enforcement professionals she had been "raped"; a problem exacerbated by the court's denial of a prosecution motion to forbid use of the terms "sex"

and "intercourse".[1] The state court had no authority to interfere with the truth-finding function in this manner.

This Court declared long ago regarding federal trials: "it is essential to the impartial and efficient administration of justice in the tribunals of the nation, that witnesses should be able to testify freely before them, unrestrained by legislation of the State, or by fear of punishment in the state courts." *Loney's Case*, 134 U. S. 372, 375 (1890). See *Catletti ex rel. estate of Catletti v. Rampe*, 334 F.3d 225, 230 (2d Cir. 2003)("uninhibited testimony is vital to the success of our courts' truth-seeking function" and 'the foundations of federal justice will be undermined if witnesses are not able to testify freely")(citation omitted); See *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir.1987)(it is the duty of every person to testify truthfully before a duly constituted tribunal...Yet, '[t]hese values, along with the first amendment values, would not be served' if the fear of retaliation and reprisal

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[1] The significance of allowing the terms "sex" and "intercourse" while forbidding "rape" cannot be overstated as the permissible terms connote pleasurable behavior while the forbidden word describes an act of criminal harm. In a criminal trial, a victim should be using words that convey criminality. Bavelas, Coates, Bohner, Gerd, *Writing about rape: Use of the passive voice and other distancing text features as an expression of perceived responsibility of the victim*, British Journal of Social Psychology, (40) pp.515-29 (2001). Moreover, there is no reason to believe the jury cannot fairly determine how to assess Petitioner's use of words, such as "rape", to describe the crime. *See e.g. Land v. Land*, 2007 Tenn. App. LEXIS 601 (Tenn. Ct. App. September 24, 2007)(noting the witness' use of curse words was of central importance in evaluating credibility); *People v. Zambrano*, 41 Cal.4th 1082 n.36 (2007)(noting that jurors can evaluate for themselves whether it is "common" for a victim to use the word "rape" to describe a sexual assault).

'effectively muzzled' witnesses testifying in open court".)(citations omitted).

The North Dakota State's Attorneys' Association (NDSAA), amicus below, expressed grave concern that orders restraining the language of witnesses may well lead to unjust mistrials and even acquittals because of the difficulties jurors will encounter in evaluating the credibility of witnesses who struggle to testify fully, truthfully, and accurately while trying to use only approved terms and phrases: "Witnesses are likely to stumble over their language or speak less fluidly when recounting events, due to the need to self-censor their testimony to abide by the court's language order." Clearly, such stilted testimony will slow down the justice process; as will the burden of dealing with mistakes, objections, side bar conversations, interlocutory appeals, mistrial motions, etc.

Even if no mistakes occur, the NDSAA wrote, "witnesses restrained by such orders will necessarily speak more slowly, shifting in their seats, breaking eye contact, or (in extreme cases) sweating due to the need to comply with a judicial order regarding their use of language. Such effects on the speaker - though not intended to alter the perception of the substance being conveyed - inherently affect the fact-finder's perception of the testimony and undermine the credibility assessed to the speaker".

In the instant case, for example, the jury failed to reach a verdict after the first trial. While there is no direct evidence the mistrial was caused by the language order, common sense dictates that a jury would be hard-pressed to conclude that a victim was raped if she never used the word "rape" during her testimony.

In addition, improper language bans are unlikely to be redressed in state court. As expressed by the NDSAA below: "prosecutors are often unable to appeal unfavorable orders, in part because: (i) in the event of an acquittal, double jeopardy effectively precludes post-trial appeals regarding language orders; and (ii) interlocutory appeals of orders on motions in limine are typically not available." Thus, review by this Court is necessary not only because of the importance of ensuring uninhibited testimony in criminal justice proceedings, but because, according to the NDSAA, "procedural constraints ensure that the legal status of language restrictions on victims and other fact witnesses, and in particular their constitutional status, is typically not addressed by reviewing courts."

Even if prosecutors could file appeals, important First Amendment issues would evade review because, as discussed *infra*, the state lacks standing to advocate on behalf of the personal constitutional rights of lay witnesses.

II. PETITIONER'S FIRST AMENDMENT RIGHTS WERE VIOLATED WHEN THE STATE COURT ORDERED HER NOT TO USE CERTAIN WORDS TO DESCRIBE HER VICTIMIZATION

Petitioner's right to provide full and truthful testimony is protected by the First Amendment[2],

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[2] Other federal courts have held that the right to testify freely and truthfully, at least in federal court, is not dependent on the First Amendment but rather, is implicitly conferred by the Constitution's establishment of a national Government. *United States v. Pacelli*, 491 F.2d 1108, 1113-15 (2d Cir.1974)(the United States Supreme Court has "long made clear that certain

Piesco v. City of New York, 933 F.2d 1149, 1158 (2d Cir.1991)(truthful testimony as a witness is protected by the Constitution without regard to content); *Bates v. Hunt*, 3 F.3d at 374, 377 (11th Cir.1993); *Benedict v. Town of Newburgh*, 95 F.Supp.2d 136 (S.C.N.Y. 2000)("...the right to testify truthfully before any tribunal, including particularly a federal district court, is a protected Constitutional right wholly apart from the right under the First Amendment to sound off in the public square or at a meeting about matters of public concern..."); *Cossette v. Poulin*, 2006 WL 3751206 (D.N.H. Dec. 18, 2006); *Samora v. Poulin*, 2007 WL 138 5621 (D.N.H. May 9, 2007); *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir.1987)("An individual's fear of official retribution could inhibit the willingness of the witness to testify truthfully. Not only would the first amendment right of the witness be infringed by this type of coercion, the judicial interest in attempting to resolve disputes by arriving at the truth would be in jeopardy").

The First Amendment to the U.S. Constitution, "perhaps the most treasured of Civil liberties", *Bridges v. California*, 314 U.S. 252, 260 (1941), provides maximum protection against governmental restraints on speech in explicit terms: "Congress shall make no law....abridging the freedom of speech." Petitioner has standing under §1983 to seek redress because this prohibition

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rights are implicitly conferred by the Constitution's establishment of a national Government intended to be 'paramount and supreme within its sphere of action.' ... One of these is the right to testify at a federal trial at response to the request or command of a federal district court"); see also *Foss v. United States*, 266 F. 881 (9th Cir.1920).

against government restraint on civil liberties extends to court orders, whether initiated by the court itself, *Berner v. Delahanty*, 129 F.3d 20 (1st Cir. 1997)(attorney filed §1983 action against state court criminal judge to seek of his right to wear a particular pin during court proccedings), or at the behest of a private person. *Shelley v. Kraemer*, 334 U.S. 1, 14, (1948)(deeming "long []established" the proposition that the actions of state courts and judicial officers in their official capacities constitute state action, even if issued on behalf of private persons*); see also Board of Education v. Barnette*, 319 U.S. 624 (1943); *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587 (1926). *New York Times Co. v. Sullivan*, 364 U.S. 254, 265 (1964).

Even in the context of preserving the essential authority of judges to control judicial proceedings, the First Amendment predominates. *Bridges v. California*, 314 U.S. 252, 260 (1941)(noting that the contempt power of all courts, federal as well as state, is limited by the guarantee of the First Amendment against interference with freedom of speech). In fact, to be punishable as contempt, courtroom conduct implicating First Amendment rights, "must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Craig v. Harney*, 331 U.S. 367, 376 (1947); *In re Little*, 404 U.S. 553, 555 (1972).

Furthermore, though trial judges have both the authority and obligation to determine whether probative substantive evidence is outweighed by its prejudicial effect, this rule has no application such that a crime victim can be ordered to describe her

victimization using words and phrases that do not accurately reflect her subjective experience.[3]

Nevertheless, the state court concluded that it should "balance" Petitioner's rights against unidentified rights of the accused and ordered Petitioner not to use certain words to describe her

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[5] Petitioner has found no federal precedent exactly on point, and although several states have addressed restrictions on the use of certain words, these decisions have been limited to orders directed at the state and at the Court itself, not private persons. *State v. Wright*, 2003 WL 21509033 (Ohio App. 9 Dist. July 02, 2003)(holding "the trial court should refrain from using the term 'victim,' as it suggests a bias against the defendant before the State has proven a 'victim' truly exists"); *Talkington v. State*, 682 S.W.2d 674, 675 (Tex.App. 11 Dist. 1984)(jury instruction referring to complaining witness as "victim" was improper. One court has expressly noted that while a judge can restrict certain words used by a prosecutor, he cannot similarly control lay witnesses. *Jackson v. State*, 600 A.2d 21 (Del.1991)(holding it was inappropriate for the prosecutor to use the "victim" label but on rehearing, noting that its decision was not intended to apply to witnesses.) The court explained: "Jackson's claim of error was directed to permitting the prosecutor to refer to the complaining witness as 'the victim.' The opinion does not state, nor does it imply, that the use of the term 'victim' by witnesses, as a term of art or in common parlance, is a basis for objection." *Id.* at 25. In one recent case, the inflammatory language choice of counsel was unsuccessfully challenged on appeal in a case where the crime was described as "horrible" and the murder committed in a "fashion most foul". *State v. Frazier*, 115 Ohio St.3d 139 (2007)(finding no error and noting that "it is difficult to discuss this crime without using such words.") Thus, even assuming a judge has the ability to order the state and its agents to use and not use certain language, the judiciary's power to issue orders against private citizens is more limited because unlike prosecutors and police, private persons are not engaged in the same type of "state action" relationship with the accused. And unlike orders against state actors, court orders against private persons necessarily provoke constitutional concerns. *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948).

victimization. In so doing, the state court failed to heed the important difference between judicial *exclusion* of prejudicial substantive evidence and judicial *censorship* of non-prejudicial substantive evidence. The former is clearly rooted in the accused's fair trial rights; the latter is not.

Even if the accused enjoys some constitutional standing in this controversy, this Court's seminal case on the issue holds that even when balancing free speech rights against the important rights of the accused in a criminal trial, "the barriers to prior restraint remain high" as "[t]he authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976); *see also ACLU v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996)(noting "[n]o long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech.")

This Court has also written of the profound importance of open and robust speech in the context of debate on matters of public importance:

> [A]bove all else, the *First Amendment* means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Cohen v. California*, 403 U.S. 15, 24 (1971); *Street v. New York*, 394 U.S. 576 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270 (1964), and cases cited; *NAACP v. Button*, 371 U.S. 415, 445 (1963); *Wood v. Georgia*, 370 U.S. 375, 388-389 (1962); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v.*

> *Oregon,* 299 U.S. 353, 365 (1937). To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).

While a criminal trial is not the same type of public forum as that which was at issue in *Mosley*, it is no less important to protect against censorship in an adversarial system where criminal conduct, an exceedingly important public concern, is being decided.

Petitioner also enjoys a First Amendment right to seek redress as a crime victim through her participation in a criminal trial. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972)(explicit and fundamental liberty interest construed to cover citizens who seek redress in judicial proceedings). Central to effective redress is the right to testify accurately and truthfully.[4]

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[17] Petitioner does not claim that her petitioning rights include a right to force the government to charge or prosecute a particular individual; but once the state decides to bring criminal charges, and thus obligates Petitioner to testify, her petitioning rights are then an inherent component of her duty

Despite this wealth of precedent, the District Court ruled that because Petitioner was allowed to take the stand and testify she suffered no legal injury; thus had no standing to seek redress in federal court. (App.D., 23a-24a). The District Court erred.

Article III, §2 of the United States Constitution provides jurisdiction in the federal courts for "cases and controversies" where the plaintiff has "standing," a mandatory jurisdictional prerequisite that requires the plaintiff to have a "cognizable" legal interest at stake. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Bennett v. Spear*, 520 U.S. 154, 167 (1997); *Steffel*, 415 U.S. at 476. Article III standing can derive from injuries to rights protected by the U.S. Constitution, statute, common law, or other legal interests.[5]

Standing has been further defined by this Court in a three-part test: (1) that the plaintiff personally has suffered actual or threatened injury that is concrete and particularized, not conjectural or hypothetical; (2) that the injury fairly can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision from the Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Steel Co. v. Citizens for a Better*

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to testify fully, accurately, and truthfully. *Contrast Linda R.S. v. Richard D.*, 410 U.S. 614, 620 (1973)(citizen has no generalized petitioning right to insist on the prosecution of another).

[6] While standing can be found even when only statutory rights require legal redress, where fundamental constitutional interests are at stake, the right to be heard presumes standing, and as a matter of due process follows necessarily. *Marbury v. Madison*, 5 U.S. 137, 163 (1803)(noting "where there is a legal right, there is also a legal remedy").

Env't, 523 U.S. 83, 103 (1998). Only the first prong of *Lujan*, whether the Plaintiff has personally suffered actual or threatened injury, is disputed in the District Court's ruling.[6]

Petitioner suffered injury in two distinct proceedings: during the first criminal trial when she was forced to comply with the court's language order under threat of contempt, and again, when the court issued a similar order in anticipation of the second trial. *Elrod v. Burns*, 427 U.S. 347, 373 (1976)("The loss of first amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").[7]

Even if there had been no first trial where Petitioner's testimony was in fact altered, mere threatened injury amounts to cognizable legal harm under the First Amendment's "chilling effect" doctrine. This rule relaxes the prudential requirement of actual injury in light of the weightier concern for the chilling effect on free speech. *Laird v.*

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[7] This is a particularly important principle for victims of certain types of violence, such as sexual assault, who experience crime in a deeply personal manner that cannot be universalized or subjected to objective standards of proper terminology. Bavelas and Coates, *Is it Sex or Assault: Erotic Versus Violent Language in Sexual Assault Trial Judgment*, Journal of Social Distress and the Homeless, (10), pp.29-40 (2001)("In the law, and in the [victim's] experience, sexual assault is unilateral"); Taslitz, Andrew, Rape and the Culture of the Courtroom, pp.115-17 (N.Y.U. Press 1999)(to preserve the personal autonomy and free speech rights of the victim, and to protect the integrity of the truth-finding function, a victim must be allowed to "tell her tale in a way closer to what is natural for her.")

[7] For similar reasons, the 8th Circuit erred when it dismissed Petitioner's appeal as moot. *Warth v. Seldin*, 422 U.S. 490, 618-19 (1975) (claims are not moot if there is actual injury).

Tatum, 408 U.S. 1, 12-13 (1972)("constitutional violations may arise from the deterrent, or 'chilling' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights"); *See also, Waters v. Churchill*, 511 U.S. 661, 669 (1994); *Secretary of State of Maryland v. Joseph H. Munson, Inc.*, 467 U.S. 947, 956 (1984); *Levin v. Harleston*, 966 F.2d 85, 89-90 (2d Cir. 1992)(university's implicit threats of future censure against faculty sufficient to violate First Amendment rights); see also *Navegar, Inc. v. United States*, 103 F.3d 994, 998-999 (D.C. Cir. 1997).

The chilling effect doctrine recognizes that if a citizen elects to discontinue engaging in the specified activity, society as a whole suffers a loss. Thus, courts will permit litigants to mount a First Amendment challenge even before the actual injury to speech occurs because the very existence of a governmental prohibition "may cause others not before the Court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

The chilling effect doctrine is particularly apt here where Petitioner faced and continues to face the separate harm of threatened criminal and civil sanctions. This Court has held such threats not only impermissible, see *Loney's Case*, 134 U. S. 372, 375 (1890)(people should be free to testify "unrestrained by ... fear of punishment in the state courts") but also sufficient to amount to injury for standing purposes. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976); *accord, D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004)(holding a chilling effect on the exercise of a plaintiff's First Amendment rights may amount to a judicially cognizable injury in fact, as long as it "arise[s] from an objectively justified fear

of real consequences"); *see Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003); *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925) and *Terrace v. Thompson*, 263 U.S. 197, 214, 216 (1923); *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006)("By definition, the injury is inchoate: because speech is chilled, it has not yet occurred and might never occur, yet the government may have taken no formal enforcement action. We cannot ignore such harms just because there has been no need for the iron fist to slip its velvet glove.")[8]

III YOUNGER/SAMUELS ABSTENTION DOES NOT BAR PETITIONER'S CLAIMS BECAUSE SHE WAS A NON-PARTY TO THE CRIMINAL PROCEEDING AND THERE WAS NO ADEQUATE STATE REMEDY.

The District Court incorrectly ruled that the abstention doctrine articulated in *Younger* and *Samuels*, which bars federal courts from enjoining state court criminal proceedings except in the "most unusual circumstances," leads inexorably to

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[8] The District Court also suggested there was no injury because Petitioner could outright refuse to testify or assert her Fifth Amendment rights. This is incorrect. A private person with knowledge of relevant facts cannot lawfully refuse to testify in a criminal proceeding, and invoking Fifth Amendment rights could well lead to a decision of the executive to grant immunity, and thus to compel her testimony. *Kastigar v. U.S.*, 406 U.S. 441 (1972).

dismissal of Petitioner's federal complaint. (App.D., 20a-21a)(citing *Younger v. Harris*, 401 U.S. 37, 56 (1971); *Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971)(applying the principles of *Younger* to declaratory judgment actions involving pending state criminal proceedings).

Abstention applies to bar a federal claim only after a three-pronged test is met: "(1) whether the action complained of constitutes an ongoing state judicial proceeding;[9] (2) whether the proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the state proceedings to raise constitutional challenges.

Under the third prong of *Younger*, abstention is inapplicable here because "an adequate opportunity" to raise constitutional challenges exists only in cases where federal plaintiffs were parties to the underlying state proceedings. *See e.g. Norwood v. Dickey*, 409 F.3d 901, 903-904 (8th Cir. 2005)(plaintiff was a party to the underlying proceedings); *Night Clubs, Inc. v. City of Fort Smith*, 163 F.3d 475 (8th Cir. 1998)(plaintiffs had litigated their claims in state court, but failed to raise the constitutional claims in the state forum); *Huffman v. Pursue*, 420 U.S. 592 (1975)(plaintiff was successor in interest to the party already prosecuted by the state and the plaintiff did not exhaust his state remedies before filing the federal action); *Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971)(plaintiffs were criminal defendants in state proceedings).

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[9] Although the underlying criminal case was technically "ongoing" at the time Petitioner filed her federal complaint, the prosecutor subsequently withdrew the charges. Thus, there is no "ongoing" state judicial proceeding. In any case, the state court matter was never "ongoing" as against Petitioner because she was not a party to the criminal case.

Abstention promotes the worthy goal of protecting state courts from the unwarranted interference of federal courts, thereby serving interests of comity, federalism, and equity. *Younger*, 401 U.S. at 43-44. From its roots in English law to the present, abstention relies fundamentally on the relationship of the federal plaintiff to the underlying state proceedings. Justice Brennan's opening words in the U.S. Supreme Court's unanimous decision in *Steffel v. Thompson,* 415 U.S. 452, 454 (1974) articulate the central focus of abstention analysis on the plaintiff's relationship to the state in the underlying litigation nothing that abstention is appropriate:

> When a state criminal proceeding under a disputed state criminal statute is pending against a federal plaintiff at the time his federal complaint is filed . . . , quoting *Younger v. Harris,* 401 U.S. 37 (1971), and *Samuels v. Mackell,* 401 U.S. 66 (1971).

Steffel, 415 U.S. at 454.

The landmark abstention cases, including those cited by the District Court, involved plaintiffs who were defendants in state actions against them and who sought federal intervention during the pendency of those proceedings. *See e.g. Younger*, 401 U.S. at 40 (plaintiff indicted by the state for criminal syndicalism); *Samuels* at 401 U.S. 66, 72-73 (1971); *Norwood v. Dickey*, 409 F.3d 901, 903-904 (8th Cir. 2005); *Mounkes v. Conklin*, 922 F. Supp. 1501, 1510-1513 (D. Kan. 1996). Because those plaintiffs had an opportunity to address their federal claims in their state proceedings, abstention was appropriate. *Juidice v. Vail*, 430 U.S. 327, 335 (1977).

Petitioner here lacked party standing in the state court, and thus had no avenue of redress as a matter of right. Indeed, her efforts reasonably to obtain such redress at the state trial and appellate court levels were unsuccessful, leaving her an unvindicated citizen who has committed no legal wrong and has experienced the multiple harms of being victimized by crime, having her free speech rights infringed by the state court and being denied judicial review. In such circumstances, abstention is inapplicable. *Steffel*, 415 U.S. at 452; *Police Department of the City of Chicago v. Mosley* ("Mosley"), *408 U.S. 92 (1972)*(abstention does not apply where plaintiff was not a defendant in state proceedings).

Federal jurisdiction is proper here, as it was in *Steffel*, and *Mosley* and as in *Roe v. Wade*, where Roe sought federal relief in a context where there was no state action pending against her. *Steffel*, 415 U.S. at 471 n.19, citing *Roe v. Wade*, 410 U.S. 113, 125-127, 166-167 (1973)(abstention "did not prevent our granting plaintiff Roe, against whom no action was pending, a declaratory judgment that the statute was unconstitutional"); *Lewis v. Kugler*, 446 F.2d 1343, 1349 (3rd Cir. 1971)).[10]

The District Court's reliance on *Juidice* for the proposition that notwithstanding Petitioner's non-party status, abstention is applicable in cases where

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[10] In a similar vein, federal courts have entertained actions for injunctive and declaratory relief in the absence of pending state prosecution against the federal plaintiffs. See, *e.g.*, *Thoms v. Heffernan*, 473 F.2d 478 (2nd Cir. 1973), *aff'g* 334 F.Supp. 1203 (Conn. 1971)(three-judge court); *Wulp v. Corcoran*, 454 F.2d 826 (1st Cir. 1972); *Crossen v. Breckenridge*, 446 F.2d 833 (6th Cir. 1971); *Lewis v. Kugler*, 446 F.2d 1343 (3rd Cir. 1971); *Anderson v. Vaughn*, 327 F.Supp. 101 (Conn. 1971)(three-judge court). *Steffel v. Thompson*, 415 U.S. 452, 458 n.8 (1974).

"a witness is threatened with, or subject to, a contempt order by a state court", (App.D., 14a), is misplaced. In point of fact, *Juidice* stands for the dual propositions that (1) a person who stands threatened with future contempt because of his ongoing and immediate violation of a court order has Article III standing, and (2) abstention applies when a state defendant refuses to avail himself of the opportunity to raise constitutional claims as part of his defense in the state proceedings. *Juidice*, 430 U.S. at 335-7.[11]

Unlike the plaintiff in *Juidice*, Petitioner does not stand in violation of any court order, may never be held in contempt, and thus cannot be said to have a fair opportunity to present her federal claims in

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[11] *Juidice* involved a judgment debtor, Vail, who sought review of constitutional claims after a state court held him to be in default on a loan. Vail failed to comply with a subpoena on penalty of contempt, failed to appear at a hearing under an order to show cause on penalty of contempt, failed to pay the fine ordered by the Court, and was ultimately held in contempt. *Juidice v. Vail*, 430 U.S. 327, 328 (1977). Vail chose not to participate in any of the state proceedings against him. Then, after the nine months during which he chose not to participate in those proceedings against him, he filed a federal action under 42 U.S.C. §1983 alleging constitutional violations in the state proceedings. As this Court noted, by opting not to participate in the underlying state proceedings against him, Vail chose not to avail himself of the opportunity to raise his constitutional claims as a part of his criminal defense, thus abstention was appropriate. *Id.* at 330. As a party in the myriad state proceedings, Vail had ample opportunities for adequate review of his constitutional claims. Furthermore, because at the time of this Court's decision Vail had still not paid the underlying judgment, he stood in a state of continued violation of the Court's order, and thus logically faced the threat of further contempt findings. This Court cited this state of ongoing contempt as a basis for Article III standing under 42 U.S.C. §1983. *Id.* at 333 n.9.

state court. Furthermore, whereas the Plaintiff in *Juidice* refused to avail himself of the opportunity to raise his constitutional claims in the state proceedings against him, the instant Plaintiff has made repeated, unavailing, efforts to obtain state court review of her constitutional claims.

The District Court suggested that Petitioner could seek relief in state court by choosing to disobey the court's language order, be held in contempt in the middle of trial and appeal therefrom. (App.D., 25a, n.10). However, this Court held in *Ex parte Young* that requiring citizens to submit to government punishment as a means of testing a law's validity is unconstitutional on its face. *Ex parte Young*, 209 U.S. at 148.[12]

Ex parte Young is "the watershed case which sanctioned the use of the Fourteenth Amendment to the United States Constitution as a sword as well as a shield against unconstitutional conduct of state officers." *Juidice*, 430 U.S. at 335 (citing *Ex parte Young*, 209 U.S. 123 (1908)(emphasis omitted)).

In *Ex parte Young*, this Court held that the court was *obligated* to take jurisdiction and grant an injunction if appropriate, even while the underlying state court matter was pending, *id.*, when a state

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[12] In *Ex parte Young*, this Court found an appropriate exercise of federal jurisdiction where the enforcement of the allegedly unconstitutional act would have led to a violation of due process through a taking of property if the statue in question were enforced. *Ex parte Young*, 209 U.S. 123, 144 (1908). Few citizens would likely volunteer to act unlawfully and face legal punishment simply in order to challenge the validity of laws that threatened their constitutional rights in order to gain access to judicial review, *Id.* at 163-165.

remedy is "inadequate to vindicate federal rights." *Juidice*, concurring opinion, 430 U.S. at 338); *Steffel*, 415 U.S. at 472-473 ("...principles of federalism not only do not preclude federal intervention, they compel it. Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head", citing *McNeese v. Board of Education*, 373 U.S. 668 (1963)); *see also Epperson v. Arkansas*, 393 U.S. 97 (1968)("it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights").

Advising otherwise blameless citizens to commit contempt of court is antithetical to the goals of maintaining order in and respect for the Courts, and encouraging citizens to act lawfully. *Juidice*, 430 U.S. at 335-336.

Professor Borchard, a principal proponent and author of the Federal Declaratory Judgment Act, gave the following statement at the legislative hearings on that Act:

> The Court, in effect, by refusing an injunction informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it. Assuming that the plaintiff has a vital interest in the enforcement of the challenged statute or ordinance, there is no reason why a declaratory judgment should not be issued, instead of compelling a violation of the statute as a condition precedent to challenging its constitutionality.

Steffel, 415 U.S. at 468 n.18 (citing Hearings on H. R. 5623 before a Subcommittee of the Senate Committee on the Judiciary, 70th Cong., 1st Sess., 75-76 (1928); E. Borchard, Declaratory Judgments x-xi (2d ed. 1941). Forcing such an unfair choice on Petitioner may also trigger equal protection concerns. *Cotting v. Kansas City Stock Yards Company*, 183 U.S. 79, 102 (1901).

Even if abstention were applicable, a well-established exception to Younger applies where, as here, the federal plaintiff already suffered, and continues to face, irreparable harm to her constitutional rights. *Younger* at 43-44; *Fenner v. Boykin*, 271 U.S. 240 (1926)(recognizing an exception to abstention where there is threatened "irreparable injury".)

The District Court ruled that Petitioner faces no irreparable harm because, should there be another criminal trial, she can choose to violate the court's order and be held in contempt. Clearly, this is not an adequate state remedy as this Court has held that "[t]he loss of first amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Failure to provide Petitioner an adequate state remedy also violates the dictates of the Fifth and Fourteenth Amendments to the U.S. Constitution which require due process before an individual can be deprived of life, liberty, or property. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). This core principle presupposes that standing to be heard is implicit in the federal due process clause whenever, as here, an individual faces the forced deprivation of a constitutionally-protected liberty interest because due process requires, at a

minimum, a "right to be heard". *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The opportunity to be heard must occur" ... at a meaningful time and a meaningful place." *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985).

A constitutionally proper hearing must reflect a proper balancing of three factors: the private interest that will be affected by the official action; the risk of erroneous deprivation of such interest through the procedures used and probable value, if any, of additional or substitute procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Mathews, supra.*

The nature of the private interest affected by the official action of the state is substantial because free speech is a recognized liberty interest of such value, it has been described as "perhaps the most treasured of civil liberties," *Bridges v. California*, 314 U.S. 252, 260 (1941)); *see Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513 (1958). And, as noted repeatedly above, "the loss of first amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. at 373.

The risk of erroneous deprivation is obvious with regard to the first trial. Petitioner was never accorded any hearing whatsoever before being ordered to use only certain words during her

descriptive trial testimony. It is axiomatic that no process violates due process.[13]

Although there was a state court proceeding of a sort prior to the second trial, its primary purpose was to determine whether Petitioner intended to comply with the court's order. To the extent there was any discussion of Petitioner's rights, it was a peripheral concern. In fact, the court made no findings whatsoever to support its conclusion that certain words were inherently unfair or incendiary, or that censoring Petitioner's testimony was necessary to protect any particular right of the accused.

Thus, the hearing was not compliant with due process. Indeed, it occurred long after the order issued and only after Petitioner's lead counsel was unavailable, having left Nebraska after receiving no communication from the court on her motion for reconsideration for more than two days. New local counsel had approximately 20 minutes to prepare.

The government interest in ensuring adequate hearings and private legal representation for lay witnesses is strong as the state represents the public and thus has no standing to advocate for the personal rights of victims. Likewise, as argued above, the government has a profoundly important interest in ensuring that witnesses testify fully and truthfully.[14]

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[13] The District Court apparently conceded this point by describing as appropriate the "modicum" of due process accorded Petitioner in connection with the second trial, but staying silent on the absence of any hearing whatsoever prior to the first trial.

[14] The government also has an interest in ensuring that the rights of the accused are adequately protected, including allowing the accused to argue to a jury that a witness' hyperbolic word choice, for example, undermines her credibility.

Additional safeguards, such as requiring that the court make specific findings, and ensuring adequate representation for lay witnesses *before* a court order is granted, would better prevent the issuance of an unconstitutional order, thus reducing the risk that a witness will resist compliance or be held in contempt mid-trial.

Even if the hearing had been procedurally proper, it was not compliant with substantive due process. The judge cited the rights of the accused as the basis for his order, yet the accused enjoys no constitutional right to the court-ordered censorship of a lay witness' descriptive testimony. Thus, the order was issued arbitrarily, which violated Petitioner's substantive due process rights. *Zimmerman v. Burch,* 494 U.S. 113, 125 (1990)(substantive due process is violated when the government acts arbitrarily, "regardless of the fairness of the procedures used..."(citations omitted)).

Even if the accused had a right to ask for language restrictions, there would still be a due process violation because the order was not narrowly tailored to serve a compelling state interest.

"Any prior restraint on expression comes to [the] Court with a 'heavy presumption' against its constitutional validity." *Nebraska Press Assn.*, 427 U.S. 539 (1976)(citing *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968)); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). This presumption imposes on the state "a heavy burden of showing justification for the imposition of such a restraint," and all government encroachments on free speech must be narrowly tailored to serve a compelling state interest. *Id.*; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

The order here was not narrowly tailored to serve a compelling state interest as no evidence was offered to identify any particular interest, much less a compelling one, to justify the censoring of Petitioner's testimony.

In the absence of a compelling interest, the state court should have summarily denied the accused's motion and instead, explained that potentially prejudicial or inflammatory testimony could be addressed through cross-examination, closing argument and jury instructions.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari. The Court may also wish to consider summary reversal.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-3487

Bethany V. Bowen,

Appellant

v.

Honorable Jeffre Cheuvront, in his official capacity as Justice of the District Court for the State of Nebraska,

Appellee

North Dakota State's Attorneys Association, Amicus on Behalf of Appellant

---

Appeal from District of Nebraska – Lincoln
(4:07-cv-03221-RGK)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 16, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-3487

Bethany V. Bowen,

Appellant

v.

Honorable Jeffre Cheuvront, in his official capacity as Justice of the District Court for the State of Nebraska,

Appellee

North Dakota State's Attorneys Association, Amicus on Behalf of Appellant

---

Appeal from District of Nebraska – Lincoln
(4:07-cv-03221-RGK)

MANDATE

In accordance with the opinion and judgment of April 03, 2008, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

May 23, 2008
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-3487

BETHANY V. BOWEN, Appellant	*	
vs.	*	**Appeal from the United States**
HONORABLE JEFFRE CHEUVRONT, in his official capacity as Justice of the District Court for the State of Nebraska, Appellee.	*	District Court for the District of Nebraska [PUBLISHED]
North Dakota State's Attorneys Association, Amicus on behalf of Appellant	*	

Submitted: March 27, 2008
Filed: April 3, 2008

Before RILEY, BEAM, MELLOY, Circuit Judges.

PER CURIAM.

Pamir Safi was charged with the felony sexual assault of Bethany Bowen in Nebraska state court. A motion in limine was granted by the trial judge with regard to several evidentiary matters. Thereafter, a trial was held which resulted in a mistrial. A second trial was scheduled. Prior to the second trial, the trial jduge renewed some or all of these earlier rulings prohibiting the use of certain terms during the course of the testimony. Prior to the completion of voir dire and jury selection, the second trial also resulted in a mistrial because of pretrial publicity arising from Ms. Bowen's objections to the trial court's evidentiary rulings. A third trial was scheduled but before it proceeded, Ms.Bowen filed this action in the federal district court seeking remedies based upon purported violations of her constitutional rights. After Ms. Bowen responded to a "show cause" order, the district court dismissed the case. After requesting reconsideration, which was denied, Ms. Bowen then filed a notice of appeal. The matter is now before us for consideration on our motion.

The record clearly establishes that the state trial judge was never served summons in this matter. As a result, neither the district judge nor this court has personal jurisdiction over the defendant/appellee. More importantly, though, the state criminal prosecution was dismissed on January 4, 2008, mooting all issues initially presented to the federal court.

In U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), Justice Scalia,

speaking for a unanimous Court stated that "'[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way [to the Supreme court] or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.'" Id. at 22 (quoting United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950)). The Court further clarified that "mootness by happenstance provides sufficient reason to vacate." Id. at 25 n.3. Following the mandate of the Supreme Court and without consideration of any rulings of the district court or any of the substantive issues before this courty, we vacate the judgment of the district court and remand this matter with directions to dismiss.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BETHANY V. BOWEN, Plaintiff vs. HONORABLE JEFFRE CHEUVRONT, in his official capacity as Justice of the District Court for the State of Nebraska, Defendant.	)	Case No. 4:07CV3221 **MEMORANDUM AND ORDER**

The Plaintiff has filed a timely motion for reconsideration under Fed.R.Civ.P.60(b)(1) and supporting papers. (Filings 13-15 & 18.) I have carefully studied the motion and supporting papers. Wishing to avoid further adverse pretrial publicity regarding the pending criminal case and the possibility of yet another mistrial, I will deny the motion with little fanfare. Simply put, none of Ms. Bowen's reasons for reconsideration have merit.

However, one brief observation is appropriate. According to Ms. Bowen, on October 5, 2007, Judge Cheuvront relaxed his earlier order to allow her to testify that she was sexually assaulted. (Filing 18 at CM/ECF pp. 17-18 & n.8) With due respect for the plaintiff's learned counsel, Judge Cheuvront's continuing good-faith effort to balance the interests of Ms. Bowen and the interests of Mr. Safi highlights

with crystalline clarity why my earlier ruling declining to interfere with the pending criminal case was correct.

IT IS ORDERED that the plaintiff's motion for reconsideration (filing 13) is denied.

October 16, 2007.

BY THE COURT:

s/ *Richard G. Kopf*
United States
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BETHANY V. BOWEN,	)	Case No. 4:07CV3221
Plaintiff	)	
vs.	)	**MEMORANDUM AND ORDER**
HONORABLE JEFFRE CHEUVRONT, in his official capacity as Justice of the District Court for the State of Nebraska,	)	
Defendant.	)	

"You've got to be very careful if you don't know where you're going, because you might not get there." [1]

For many years, the Supreme Court has made it plain that a federal judge should not use his or her discretionary power under the declaratory judgment statute to interfere with a pending state criminal prosecution except in the most extraordinary of circumstances *Samuels v. Mackell*, 401 U.S. 66 (1971). Because the plaintiff and her counsel have failed to acknowledge *Samuels*, let alone deal with its implications, they have also failed to show cause why Rule 11 has not been violated by the filing of the plaintiff's complaint. As a consequence, I will dismiss this case without prejudice and caution the

[1] William D. Araiza, and 38 other law professors, *The Jurisprudence of Yogi Berra*, 46 Emory L.J. 697, text at n.369 (1997).

plaintiff's counsel to be more careful.

I. Background

The plaintiff has filed a very unusual lawsuit that seeks to interject this court into the ongoing administration of a pending state criminal prosecution. The plaintiff alleges that she is a victim of sexual assault, that Pamir Safi has been charged with that assault in a Nebraska court, that she is a witness in the case, and that the Honorable Jeffre Cheuvront, a Nebraska district judge, wrongly issued an order in the Safi prosecution "forbidding all witnesses [from using] the words: 'rape', 'victim', 'assailant', 'sexual assault kit' and 'sexual assault nurse examiner'." (Filing 1, Complaint ¶¶ 1, 8.) Asserting that the criminal case has resulted in two mistrials, and a third trial is scheduled to take place in the next several months, the plaintiff requests "an expedited bench trial" and she seeks an order "declaring that the defendant herein has acted in violation of the federal constitution." (Filing 1, Complaint, "Demands for Judgment" ¶ 1, at CM/ECF p. 8.) Because she apparently recognizes that the law forbids such requests, Ms. Bowen does not seek damages or injunctive relief. (*Id.*)

In response to the plaintiff's complaint, I entered an order requiring the plaintiff and her counsel to show cause why the complaint did not violate Rule 11. (Filing 4.) I also gave Judge Cheuvront leave not to answer or otherwise respond to the plaintiff's complaint until I ordered otherwise. In particular, I ordered the plaintiff and her counsel to show cause why I should not conclude that (a) the

complaint was filed for an improper purpose[2] and (b) the claims and legal contentions set forth in the complaint are not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. *See* Federal Rule of Civil Procedure 11(a), (b) & (c)(1)(B); *Clark v. United Parcel Service, Inc.*, 460 F.3d 1004, 1008 (8th Cir. 2006) ("A district court may impose Rule 11 sanctions on its own initiative, but it must first enter an order describing the specific conduct that appears to violate Rule 11(b), and direct the attorney to show cause why he has not violated the rule."). Among others, I expressed a concern that this action might improperly interfere with the pending state criminal prosecution.

The plaintiff and her counsel have now responded. (Filings 9 & 10.) The plaintiff admits that her case is unprecedented. For example, she states (with hyperbolic flare) that "this case stands in the eye of a perfect legal storm in terms of offering this Court a unique opportunity to resolve an important, and thus far unredressed anywhere, legal controversy." (Filing 9, at CM/ECF p. 11.) She adds that this "is a case of first impression" seeking, if necessary, an "extension or modification of existing law" to "provide declaratory guidance to state courts in the novel matters raised herein." (Filing 9, at CM/ECF pp. 17-18.)

To justify her unique complaint, the plaintiff provides the following history:

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[2] Because the record is insufficient, I decline to determine whether this case was brought for an improper purpose.

In the underlying criminal action, the State charged Pamir Safi with felonious sexual assault of the instant Plaintiff. The Plaintiff reported that after consuming alcohol at a college Halloween party, Mr. Safi, a man she did not know and has no memory of ever meeting, drugged her, took her against her will to another location, and that she awoke from an unconscious state to find herself covered in vomit while being raped by Mr. Safi.

The underlying criminal case has been scheduled for trial twice. The first two trials ended in mistrial rulings. A third trial is tentatively scheduled for late 2007 or early 2008.

Prior to the first criminal trial, Mr. Safi's counsel filed a motion in limine to preclude witnesses from using the words "victim," "assailant," "attack," "sexual assault kit," and "rape" alleging that these words would be "unfairly inflammatory, prejudicial, or misleading and they invade the province of the jury." Lanc. Co. Neb. Dist. Ct. Case No. CR05-0087, Defense "Motion in Limine: Prejudicial Terms," filing #15, October 10, 2006. In response, Judge Cheuvront precluded specified testimonial language ("language order") in an order from the bench.

Nebraska Assistant County Attorney Pat Condon formed the legal opinion that the State wanted to seek judicial review but had no authority to file an interlocutory appeal from a

motion in limine, and subsequently conveyed this fact to Plaintiff's counsel Wendy Murphy and Sue Ellen Wall.

Judge Cheuvront placed the instant Plaintiff under legal oath to testify truthfully and accurately during the first trial. The jury was unaware of the court's language order. Plaintiff stumbled in her testimony as she attempted to comply with the language order. Plaintiff and other witnesses reportedly had difficulty complying and on more than one occasion used the forbidden terminology. The first trial resulted in a mistrial because the jury could not agree on a unanimous verdict.

Prior to the second trial, on July 2, 2007, Judge Cheuvront ordered the Plaintiff to refrain from using the terms "rape," "assailant," and "victim." The court further ordered that the "rape kit" or "sexual assault kit" be referred to as the "sexual examination kit" and the SANE (Sexual Assault Nurse Examiner) Nurse be referred to as the "sexual examiner." A prosecution motion seeking to forbid use of the words "sex" and "intercourse" was denied.

Judge Cheuvront then ordered the witnesses, including the Plaintiff, to sign an order acknowledging the language order and the possible punishments they faced if they violated the language order ("acknowledgment order"), which included contempt. Believing the language order violated her constitutional rights, the Plaintiff refused to sign the acknowledgment order and sought a venue for a

procedurally appropriate review to seek redress of her First Amendment and due process claims. Citing Nebraska law, the Plaintiff asked Judge Cheuvront to hold her in contempt, and stay any related sanction pending appeal as a means to obtain appropriate review of her claims regarding the language order. Judge Cheuvront declined to consider her request.

The Plaintiff then filed a Writ of Habeas Corpus with the Nebraska Supreme Court seeking review of her constitutional claims on July 10, 2007. Her Writ was dismissed without hearing or comment on July 11, 2007.

Plaintiff's original local counsel withdrew because of a conflict. Plaintiff obtained substitute local counsel, Attorney Wall, who filed a motion for reconsideration of the language order on July 11. On July 11, 2007, Judge Cheuvront conducted a hearing on the issue of whether the instant Plaintiff intended to comply with his language order during trial. She testified that she did not believe she could take an oath to tell the truth and then use words that did not accurately reflect her experience. At that hearing, the Plaintiff's constitutional claims were not reviewed according to the requisite standard and her motion for reconsideration was not addressed. The following day, prior to the completion of *voir dire* and jury selection, Judge Cheuvront declared a mistrial on grounds related to pretrial publicity and public criticism of his language order. The mistrial ruling was

> unrelated to the Plaintiff's anticipated noncompliance with the court's language order.
>
> On or about August 23, 2007, the Plaintiff learned that the criminal case would proceed to a third trial at the end of 2007 or early 2008. She commenced this action on or about September 6, 2007 seeking an expedited hearing for declaratory relief prior to the beginning of the third criminal trial.
>
> On September 10, 2007, Judge Kopf served an Order to Show Cause on Plaintiff's counsel citing Fed. R. Civ. P. 11(b)(1) and (2).

(Filing 9, at CM/ECF pp. 3-5.)

For present purposes, I take the plaintiff's statement of facts to be true. I also assume that Ms. Bowen and her counsel are subjectively well-motivated.

The same holds true for Judge Cheuvront. That is, I assume (and there is no claim to the contrary) that the judge is only trying do his level best. I also assume (and there is no claim to the contrary) that the judge has jurisdiction to do what he has done.

II. Analysis

First, I examine the plaintiff's demand for a declaratory judgment and the federal law regarding declaratory judgments through the prism of Rule 11. Second, concluding that Rule 11 has been violated, I explain what sanctions are appropriate.

A. Declaratory Relief is Plainly Not Available and Rule 11 Has Been Violated

As the plaintiff recognizes by failing to seek damages, Judge Cheuvront would have had absolute judicial immunity had she sought monetary relief even if the judge violated her rights as alleged. *See, e.g., Sveeggen v. United States*, 988 F.2d 829, 830-31 (8th Cir. 1993) (affirming dismissal of suit and award of Rule 11 sanctions because judges have absolute judicial immunity when they act within their jurisdiction). In the same vein, and as the plaintiff recognizes by failing to seek injunctive relief,[3] this court cannot enjoin Judge Cheuvront in this action even if he violated the plaintiff's federal rights as alleged. This is because Congress, in the statute upon which the plaintiff relies, has precluded injunctive relief in the absence of an earlier declaratory judgment or a showing that declaratory relief was unavailable. 42 U.S.C. § 1983 (providing that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable"). *See, e.g., Kircher v. City of Ypsilanti,* 458 F. Supp. 2d 439, 447-448 (E.D. Mich. 2006) (applying 42 U.S.C. § 1983; holding that the plaintiff was not entitled to injunctive relief ordering that the defendant-judges "not violate the U.S. Constitution" because the plaintiff had not alleged that the judges violated a prior declaratory decree or

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[3] In her response, the plaintiff confirms that she is not seeking injunctive relief. (Filing 9, at CM/ECF p. 7.) Indeed, the plaintiff suggests that she intentionally sought "declaratory rather than injunctive relief" (*Id.*)

that declaratory relief was unavailable; awarding sanctions under Rule 11 for maintaining claim for equitable relief against judges).

Thus, the only remaining federal remedy open to the plaintiff is the very narrow window of declaratory relief. Declaratory relief requires, and in every conception of any law that I could imagine would always require, a clear showing that it is necessary and appropriate for a federal judge to interfere with the pending state criminal prosecution. Giving the plaintiff the benefit of every doubt, there is no possibility that the plaintiff can make the requisite showing that it is necessary and appropriate to interfere with the pending state criminal prosecution.

The foregoing being true, it is obvious that Rule 11 has been violated. I next explain in more detail why that is true.

1. Declaratory Relief in the Federal Courts Is Discretionary With the Judge

Because federal courts have never had the power to render advisory opinions, for much of our history it was believed that a federal judge had the power to declare the rights and obligations of the parties "only when a complainant is entitled to a coercive remedy, such as a judgment for damages or an injunction." 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2751, at 455 (1998 & Supp. 2007).In other words, if one was not entitled to damages or an injunction, one was not entitled to a federal judicial declaration that one's opponent had done something

wrong.

In 1934, with the adoption of the Declaratory Judgment Act, the law changed. *Id.* § 2752. Now, in certain circumstances, federal judges have authority to issue declaratory judgments even when, as is the case here, no damages or injunctive relief is sought. *Id.* § 2751. The federal law on declaratory judgments is presently found in 28 U.S.C. § 2201[4] and 28 U.S.C. § 2202.[5] In addition, Federal Rule of Civil Procedure 57 makes all actions for declaratory relief subject to the Federal Rules of Civil Procedure. Thus, Rule 11 is explicitly applicable to suits for declaratory judgment.

Unlike other cases, a federal judge has discretion to deny relief in a declaratory judgment action even when he or she might otherwise be persuaded that the plaintiff is entitled to relief. As Justice O'Connor has made clear when speaking for the Supreme Court:

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[4] As pertinent to this case, the statute provides that "[i]n a case of actual controversy within its jurisdiction any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

[5] That statute states: "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." This, of course, grants me the "federal hook" to force Judge Cheuvront to do what I say, in mid-trial or otherwise, should he stray (intentionally or accidentally) from any declaration of Ms. Bowen's rights that I might make.

> By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; *it created an opportunity, rather than a duty,* to grant a new form of relief to qualifying litigants. *Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close.* In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.

Wilton v. Seven Falls, 515 U.S. 277, 288 (1995) (footnote omitted) (emphasis added).

Like Justice O'Connor, leading scholars make it plain that I have no duty to grant the plaintiff relief even if she might otherwise be entitled to it. They state:

> Thus, it is well settled by a multitude of cases that the granting of a declaratory judgment rests in the sound discretion of the trial court exercised in the public interest. It is always the duty of the court to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief.

Federal Practice and Procedure § 2759, at 540-542 (footnotes omitted).

Without intending to be unkind, the plaintiff and her counsel seem totally unaware that I have no duty to act for her and that, in any event, I am free to act only after considering the "public interest" and the "proper balance between the needs of the plaintiff and the consequences of giving the desired relief." Because the plaintiff and her counsel have failed to do so in any meaningful fashion, I turn to those considerations next.

2. *Except in Extraordinary Circumstances, Federal Judges Are Not Supposed to Stick Their Noses Into Pending State Criminal Prosecutions*

In *Younger v. Harris*, 401 U.S. 37, 56 (1971), the Supreme Court held that federal courts are not to enjoin pending state court criminal proceedings except in the "most unusual circumstances." *Federal Practice and Procedure* § 2764, at 626. Referring to the "longstanding public policy against federal court interference" with state criminal matters,[6] the Court grounded the *Younger* doctrine on concerns of comity, federalism, and equity. *Younger*, 401 U.S. at 43-44.

Our Court of Appeals has nicely summarized the *Younger* doctrine this way:

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[6] *See, e.g., Fenner v. Boykin*, 271 U.S. 240 (1926) (stating that cases like *Ex Parte Young*, 209 U.S. 123 (1908) "have established the doctrine that, when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done, except under extraordinary circumstances, where the danger of irreparable loss is both great and immediate").

> In *Younger*, the Supreme Court held that federal courts may not enjoin pending state court criminal proceedings except in very unusual situations. . . . There are essentially three issues that must be addressed in determining whether to invoke the *Younger* abstention doctrine: (1) whether the action complained of constitutes an ongoing state judicial proceeding; (2) whether the proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the state proceedings to raise constitutional challenges. If all three questions are answered affirmatively, a federal court should abstain unless it detects "bad faith, harassment, or some extraordinary circumstance that would make abstention inappropriate."

Night Clubs, Inc. v. City of Fort Smith, Ark., 163 F.3d 475, 479 (8th Cir. 1998) (citations omitted).

On the same day the Supreme Court decided *Younger*, the Court also applied the *Younger* principles to declaratory judgment actions involving pending state criminal prosecutions. *Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971). There the Court stated:

> We therefore hold that, in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an

> injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.

Id. at 73.

Leading treatise writers have stated that the "holding" in *Samuels* "has been applied in numerous cases since and declaratory relief denied in order to avoid interfering with state criminal proceedings." *Federal Practice and Procedure* § 2764, at 626 (footnote omitted). Unfortunately, the plaintiff and her counsel have failed to cite *Samuels* (or *Younger*), let alone deal with the implications. (*See* Filing 9.)

Of course, I am aware that Ms. Bowen is not the target of the state criminal action, but, rather, she is a witness who may testify in that criminal proceeding. This difference—witness versus defendant—distinguishes her request for equitable relief from those in *Younger* and *Samuels*. That acknowledged, the principles are the same. Ms. Bowen wants me to use my federal equitable power to shape the contours of the ongoing prosecution of a state criminal case. This is precisely the interference that the Supreme Court had in mind when it adopted the principles set forth in *Younger* and *Samuels*. Indeed, the Supreme Court has held that these principles are applicable in situations where a witness is threatened with, or subject to, a contempt order by a state court. *Juidice v. Vail*, 430 U.S. 327, 335-336 (1977) (applying *Younger* and holding, with respect to debtors subpoenaed to appear in court to give testimony about their finances, that "[t]hese principles apply to a case in which the State's contempt process is involved").

3. Applying the Supreme Court's Precedents, Declaratory Relief is Obviously Unwarranted and Rule 11 Has Been Violated

It is obvious that I cannot provide the plaintiff with the relief she seeks without substantially interfering with the upcoming criminal trial. That would violate the Supreme Court's precedents. There is no nonfrivolous argument that would justify my disregard of those precedents.

Make no mistake, through the vehicle of a declaratory judgment, the plaintiff wants me to jump right into the middle of the pending state criminal case and the upcoming third trial. For example, in her complaint, she asks that I give Judge Cheuvront "[g]uidance" regarding the "practice of state court judges issuing orders restricting the language of victims and witnesses" (Filing 1, at CM/ECF pp. 1-2.) The same request for "guidance" is made by a state prosecutor from Oregon who filed an affidavit (which, incidentally, was not properly notarized) in support of the plaintiff. (Filing 10, at CM/ECF p. 3 ¶ 5.) All of these statements are made in the context of Judge Cheuvront's scheduling the third trial. Using their euphemism, the plaintiff and her supporter from Oregon ask me to "guide" Judge Cheuvront as he tries the Safi case for a third time.

This must be so because if the plaintiff is only basing her complaint on what happened to her in the past, and not also on what may happen to her in the future, she has plainly suffered no "injury" and she lacks Article III "standing" to bring this action. In

the first criminal trial, she was able to testify, Judge Cheuvront did not hold her in contempt, and the jury deliberated and reached an impasse. In the second criminal trial, Ms. Bowen was not required to testify because a mistrial was declared due to pretrial publicity before the jury was selected. Even though she asked to be held in contempt, Judge Cheuvront declined to do so. As a result, *if* the plaintiff looks only to the past, her complaint fails for lack of Article III standing. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561(1992) (holding, among other things, that the "irreducible constitutional minimum of standing" requires that plaintiff "have suffered an 'injury in fact'" which is "an invasion of a legally protected interest" that is "concrete and particularized" and "'actual or imminent,'" rather than "'conjectural' or 'hypothetical'") (citations omitted).

If it were otherwise, then any disgruntled witness who appears before a state judge has the keys to the federal courthouse to use whenever she dislikes the tenor of a state judge's ruling limiting her testimony. That, obviously, is not the law and I cannot imagine it ever becoming the law It is only the threat of contempt in the future that gives the plaintiff arguable Article III standing to bring this suit today.[7]

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[7] There is a very strong argument that even a threat of contempt does not confer "standing" on the plaintiff because the threat is conjectural. After all, Judge Cheuvront has already declined one invitation to hold Ms. Bowen in contempt, the Nebraska prosecutor may convince Judge Cheuvront to change his mind in whole or in part, Ms. Bowen may decide to testify despite the judge's limitation and her testimony might go better than she expects, or Ms. Bowen may simply refuse to testify or invoke her privilege against self-incrimination. That

To be clear, then, the plaintiff wants something more than a declaration about what happened in the past. Specifically, she wants me to tell Judge Cheuvront how to rule in the future on issues like the plaintiff's use of the word "rape"[8] when (and if) she appears as a witness during the trial of Mr. Safi. With that prospect grimly[9] in mind, I will next determine whether the plaintiff has any plausible argument in her favor.

(a) The Plaintiff Cannot Make the Necessary Showing For Federal

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said, I do not base my decision on the plaintiff's lack of standing. Rather, I discuss standing to point out that the plaintiff can go forward *only* if the logic of her complaint would compel me to tell Judge Cheuvront what he must do in Mr. Safi's next trial if I were to agree that his order somehow violated Ms. Bowen's federal constitutional rights. Bluntly put, Ms. Bowen cannot get around the limitations on federal declaratory relief by claiming that she is only seeking a judgment on what happened in the past.

[8] For the life of me, I do not understand why a judge would tell an alleged rape victim that she cannot say she was "raped" when she testifies in a trial about rape. Juries are not stupid. They are very wise. In my opinion, no properly instructed jury is going to be improperly swayed because a woman uses the word "rape" rather than some tortured equivalent for the word. But please read the next footnote.

[9] I say "grimly" for a variety of reasons, not the least of which is that I have no experience (nada, zip, zilch, zero) presiding over rape cases. While I have been on the federal bench over 20 years and have presided over tons of criminal cases and hundreds of jury trials, I have never sat as a judge on an ordinary rape case. If the plaintiff's lawyers are really serious about *me* "guiding" Judge Cheuvront, they might want to think again. Trust me, federal judges are no smarter (or dumber) than their state counterparts. We may, however, seem more arrogant. For myself, I plead guilty to that charge.

Intervention in the State Criminal Proceeding

Ms. Bowen and her counsel have utterly failed to make a plausible showing that the circumstances necessary for a declaratory judgment are present in this case. *See, e.g., Norwood v. Dickey*, 409 F.3d 901, 903-04 (8th Cir. 2005) (affirming dismissal and holding that attorney's § 1983 action against justices of Arkansas Supreme Court challenging constitutionality of confidentiality provision of judicial rules was barred by *Younger* doctrine; proceedings before Commission were ongoing when attorney brought claim, proceedings implicated important state interest of quality of its judiciary, and attorney could have presented his claim to state tribunals); *Mounkes v. Conklin*, 922 F. Supp. 1501, 1510-1513 (D. Kan. 1996) (dismissing action and holding that in suit against judges seeking declaratory and injunctive relief regarding enforcement of bail bond rules, plaintiffs did not demonstrate extraordinary circumstances for federal equitable intervention as required under *Younger*) (citations omitted).

First, there is no question that the action complained of takes place within the context of an ongoing state criminal prosecution. Second, the proceedings clearly implicate important state interests. Third, there is an adequate opportunity in the state proceeding to raise Ms. Bowen's constitutional challenges.[10] Fourth, there is not the

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[10] Judge Cheuvront has *already* provided Ms. Bowen with a modicum of due process by holding a hearing in which she and her lawyers were given the opportunity to appear and voice their views. Furthermore, if Ms. Bowen is held in contempt,

slightest reason to believe that Judge Cheuvront is acting in bad faith or to harass Ms. Bowen. Fifth, this case is not "extraordinary." Witnesses, who also claim to be victims, are subjected to all sorts of limitations on their testimony in all sorts of criminal cases in all sorts of courtrooms for all sorts of reasons. Ms. Bowen and her case are not special.

In summary, invoking federal jurisdiction seeking a declaratory judgment against a state court judge who is presiding over a state criminal case is serious business requiring far more legal support than Ms. Bowen and her counsel have provided. With that in mind, I turn next to Rule 11.

(b) The Plaintiff's Complaint Violates Rule 11

Rule 11 provides that when a party or a lawyer files a complaint, that person certifies that the

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she will be afforded meaningful due process under Nebraska law. *See, e.g., In Re Rice*, 60 N.W.2d 668, 671 (Neb. 1953) (in a contempt proceeding, Chief Justice Simmons made clear that under Nebraska law a "finding and punishment of a witness for contempt for properly protecting himself from an illegal inquisition will not be upheld"). There is nothing before me that even vaguely suggests that the courts of the State of Nebraska will refuse to safeguard Ms. Bowen's constitutional rights at the appropriate time. As an aside, Ms. Bowen's hapless and unsuccessful attempts to be held in contempt or to bring suit in the Nebraska Supreme Court before her case was ripe prove only that the courts of Nebraska take their work seriously. When all is said and done, I will "'not engage any presumption "that the state courts will not safeguard federal constitutional rights."'" *Norwood*, 408 F.3d at 904 (quoting *Neal v. Wilson*, 112 F.3d 351, 357 (8th Cir. 1997), in turn quoting *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982)).

"claims . . . and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . . ." Fed. R. Civ. P. 11(b)(2). Rule 11(b)(2) has been violated in this case because the claim for declaratory relief set forth in the complaint is plainly lacking in support under any reading of federal law. *See, e.g., Kircher*, 458 F. Supp. 2d at 447-448, 453-454 (awarding sanctions under Rule 11 in suit brought under section 1983 against judges seeking only federal equitable relief because it was apparent that such relief was unavailable). Indeed, the plaintiff and her counsel have ignored the precedents regarding the limitations on declaratory judgment actions in federal court. Because they apparently do not understand the limitations of federal law as it presently exists, the plaintiff and her counsel have also failed to advance a nonfrivolous argument for the extension, modification, or reversal of that law or the establishment of new law.

B. The Appropriate Sanctions

Having concluded that Rule 11 has been violated, I must determine what sanctions are appropriate. I am required to pick the sanctions that "are sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2). With that in mind, the appropriate sanctions are two-fold. They are: (1) dismissal without prejudice of the plaintiff's complaint and (2) a caution, herewith given to the plaintiff's passionate counsel, to more carefully consider the limits of federal declaratory relief before

filing similar suits in the future.[11] This is sufficient, but no more harsh than necessary, to deter the plaintiff, her counsel, and others from future conduct like that presented here.

III. Conclusion

I am aware that my handling of this unprecedented complaint under Rule 11 is out of the ordinary. I am also aware that Rule 11 is not intended to serve as a substitute for the adversarial process in general or motion practice in particular. The foregoing said, I am extremely and especially reluctant to force Judge Cheuvront to respond to the plaintiff's complaint seeking declaratory relief, a complaint that in my opinion obviously violates Rule 11, while he is also overseeing a difficult state criminal case that has generated frenzied media attention. I fear that any response the judge might be required to make in this case could cause him to be disqualified from presiding over the state criminal matter. Furthermore, the mere pendency of this case casts a dark shadow over Judge Cheuvront's continued supervision of the criminal case. He must not be required to "look over his shoulder" while he is preparing to try the state criminal case for yet a third time.

For all of these reasons, the utilization of Rule 11 to get at this matter rapidly is justified. Accordingly,

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[11] The names of counsel who signed the complaint and the response to the order to show cause are Jennifer A. Hoult, Sue Ellen Wall, and Wendy J. Murphy. (Filing 1, at CM/ECF pp. 8 & 9; Filing 9, at CM/ECF pp. 26 & 27.)

IT IS ORDERED that this case is dismissed without prejudice for violation of Rule 11. A separate judgment will be issued contemporaneously with the entry of this decision.

September 25, 2007.

BY THE COURT:
s/ Richard G. Kopf
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BETHANY V. BOWEN,	)	Case No.
	)	4:07CV3221
, Plaintiff	)	
vs.	)	**MEMORANDUM**
	)	**AND ORDER TO**
	)	**SHOW CAUSE**
HONORABLE JEFFRE CHEUVRONT, in his official capacity as Justice of the District Court for the State of Nebraska,	)	
Defendant.	)	

IT IS ORDERED that on or before the close of business on Tuesday, September 18, 2007, the plaintiff and her counsel shall show cause why I should not conclude that (a) the complaint was filed for an improper purpose and (b) the claims and legal contentions set forth in the complaint are not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. Judge Cheuvront shall not be obligated to answer or otherwise respond to the plaintiff's complaint until I order otherwise. Show Cause Deadline set for 9/18/2007.Ordered by Judge Richard G. Kopf. (JAB)

September 10, 2007.

BY THE COURT:
s/ *Richard G. Kopf*
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BETHANY V. BOWEN,	)	Case No. 4:07CV3221
Plaintiff	)	
vs.	)	**MEMORANDUM AND ORDER**
HONORABLE JEFFRE CHEUVRONT,[1] in his official capacity as Justice of the District Court for the State of Nebraska,	)	
Defendant.	)	

The Plaintiff has filed a very unusual lawsuit that seeks to interject this court into the ongoing administration of a pending state criminal prosecution. The plaintiff alleges that she is a victim of sexual assault, that Pamir Safi has been charged with that assault in a Nebraska court, and that the Honorable Jeffre Cheuvront, a Nebraska district judge, wrongly issued an order in the Safi prosecution, "forbidding all witnesses [from using] the words 'rape', 'victim', 'assailant', 'sexual assault kit' and 'sexual assault nurse examiner.'" (Filing1, Complaint ¶¶ 1, 8.) Requesting "an expedited bench trial," the plaintiff seeks an order "declaring that the defendant herein has acted in violation of the federal constitution." (Filing 1, "Demands for Judgment," ¶

[1] When the plaintiff opened this case, it appears that she misspelled the judge's name on the docket sheet. That is, she spelled his last name "Chevront."

1 at CM/ECF p.8.)

There is something profoundly disturbing about the notion that a federal judge has the power to tell a state judge how to do his job, particularly when that state judge is presumably trying to do nothing more than protect the rights of a citizen who may have been wrongly accused of rape.[2] In this regard, I have serious concerns about forcing Judge Cheuvront to defend himself while also presiding over the state criminal case. Thus, and until I am satisfied that progression of this case is appropriate, I shall not require the judge to answer or otherwise respond to the plaintiff's complaint until I order otherwise.[3]

More importantly, I have serious reservations about whether this action was commenced for the improper purpose of forcing Judge Cheuvront to recuse himself from presiding over the state criminal matter or for the improper purpose of generating pretrial publicity about the plaintiff and the criminal case. Still further, I seriously doubt whether the plaintiff's suit has any basis whatsoever. For

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[2] This also strikes me as insufferably arrogant and, unfortunately, all too typical of the thinking of those who view the federal courthouse as the proper forum for the advancement of their particular brand of gender politics. That said, there is also something profoundly disturbing about a judge telling a citizen that she cannot say she was raped when testifying as a victim in a criminal case, particularly when the victim is presumably trying to do nothing more than describe what happened to her. This brings to mind the blue burkas of a distant place. *See* Asne Seierstad, *The Bookseller of Kabul* (Back Bay Books 2004).

[3] Of course, the judge may answer or otherwise respond if he wishes to do so.

example, and not by way of limitation, I cannot find any precedent for a suit of this kind and the plaintiff could avoid any "injury" whatsoever by simply electing not to testify, or, if subpoenaed, by invoking her Fifth Amendment privilege.

As a result, I shall order the plaintiff and her counsel to show cause why I should not conclude that (a) the complaint was filed for an improper purpose and (b) the claims and legal conclusions set forth in the complaint are not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. See Federal Rule of Civil Procedure 11(a), (b) & (c)(1)(B); *Clark v. United Parcel Service, Inc.*, 460 F.3d 1004, 1008 (8th Cir. 2006) ("A district court may impose Rule 11 sanctions on its own initiative, but it must first enter an order describing the specific conduct that appears to violate Rule 11(b), and direct the attorney to show cause why he has not violated the rule.").

I warn the plaintiff and her counsel that sanctions may be imposed for failure to show cause. See Federal Rule of Civil Procedure 11©. Sanctions may include dismissal of this case with or without prejudice, monetary sanctions, or such other sanctions as the court deems proper.

IT IS ORDERED that on or before the close of business on Tuesday, September 18, 2007, the plaintiff and her counsel shall show cause why I should not conclude that (a) the complaint was filed for an improper putpose and (b) the claims and legal contentions set forth in the complaing are not warranted by existing law or by a nonfrivolous

argument for the extension, modification, or reversal of existing law or the establishment of new law. Jduge Cheuvront shall nto be obligated to answer or otherwise respond to the plaintiff's complaing until I order otherwise.

September 10, 2007

BY THE COURT:

s/ *Richard G. Kopf*
United States
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BETHANY V. BOWEN,	)	Case No. 4:07CV3221
Plaintiff	)	
vs.	)	
	)	**JUDGMENT**
HONORABLE JEFFRE CHEUVRONT, in his official capacity as Justice of the District Court for the State of Nebraska,	)	
Defendant.	)	

Pursuant to the mandate (filing 33) of the United States Court of Appeals for the Eighth Circuit, the prior judgment (filing 12) of this court is vacated and this case is dismissed as moot.

May 27, 2008

BY THE COURT:

s/ Richard G. Kopf
United States
District Judge

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	Case Number:
	)	CR 05-087
	)	
Plaintiff,	)	
	)	
	)	MOTION IN LIMINE
	)	RE: PREJUDICIAL
	)	TERMS
PAMIR J. SAFI,	)	
	)	
Defendant	)	

COMES NOW the State of Nebraska, by and through Patrick F. Condon, Deputy County Attorney, and moves the Court for an order to preclude the defense from using terms such as "sex" and "intercourse" or any other terms which imply the consensual participation of Ms. Bowen, with relation to the activities of the morning of October 31, 2004 involving Ms. Bowen and Mr. Safi.

Said term is unfairly prejudicial and misleading; and invades the province of the jury. Their use should be prohibited pursuant to Neb..Stat. §Neb. Rev.Stat.27-403.

WHEREFORE, the State prays for an order sustaining this motion in limine and directing the defense to not use these terms in the questioning of witnesses and directing any witnesses he may call, including the defendant, from using such terms. Dated this ____ day of May, 2007.

Respectfully submitted,

GARY LACEY
COUNTY ATTORNEY

Patrick F. Condon
Deputy County Attorney

NOTICE OF HEARING

TO: Defendant's Attorney Clarence Mock

Take notice that the above-entitled Motion shall be called on for hearing in the District Court for Lancaster County, Nebraska, District Court #37, third floor, Hall of Justice Building, 575 South Tenth Street, Lincoln, Nebraska, before the Honorable Jeffre Cheuvront, on June 6, 2007, at 9:00 a.m. or as soon thereafter as the same may be heard.

Patrick F. Condon #18772
Deputy County Attorney
575 South 10th
Lincoln, NE 68508

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Motion was mailed by United States Mail, postage

prepaid/Faxed/Interoffice mail/Hand Delivered to Defendant's Attorney, Clarence E. Mock, 307 North Oakland, P.O. Box 62, Oakland, NE 68045, this 31st day of May 2007.

Patrick F. Condon
Deputy County Attorney

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	Case Number:
	)	CR 05-087
	)	
Plaintiff,	)	
	)	
	)	ORDER
	)	
	)	
PAMIR J. SAFI,	)	
	)	
Defendant	)	

In order to assure compliance with the orders of this court relating to trial conduct and motions in limine and to diminish the possibility of a mis-trial, it is ordered that all witnesses, prior to their testimony, read and sign the attached form.

Dated July 2, 2007

BY THE COURT:

_____

Jeffre Cheuvront
District Judge

IN THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	Case Number:
	)	CR 05-087
	)	
Plaintiff,	)	
	)	
	)	ACKNOWLEDGMNT
	)	OF COURT'S
	)	ORDER
PAMIR J. SAFI,	)	
	)	
Defendant	)	

The undersigned witness in the above entitled case has been advised, and acknowledges that the court, in order to insure a fair trial before and impartial jury, has entered an order prohibiting the use of the following terms of phrases during the trial of the case:

1. The terms "victim," "assailant," or "rape."

2. The term "sexual assault kit;" it is permissible to refer to such a "kit" as a "sexual examination kit."

3. The term "sexual assault nurse;" it is permissible to refer to one as having special training in "sexual examinations."

4. That there was a previous trial of this case, or that testimony was given as a previous trial.

5. That Bethany Bowen may have consumed

controlled substances or drugs, other than intoxicating liquor, on the evening of October 30 and morning of October 31, 2004.

The undersigned understands that if he or she violates the order of this court and if it is determine that such violation is willful or deliberate, the undersigned could be held in contempt of the court's order and certain sanctions could be imposed.
Dated July_____ 2007

_____
Witness Signature

_____
Printed Name

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	Case Number:
	)	CR 05-087
	)	
Plaintiff,	)	
	)	
	)	ORDER
	)	
	)	
PAMIR J. SAFI,	)	
	)	
Defendant	)	

On June 6, hearing was held on motions in limine and motion to reconsider a prior ruling on certain evidence filed by the state and the defendants.

IT IS ORDERED AS FOLLOWS:

1. The state's motion to reconsider (Filing 23) is sustained in part and overruled in part. Ms. Bowen may testify as to how she felt physically on the morning of October 31, 2004, that is, that she felt bad or terrible, that she had a bad hangover, that she had never felt this bad after a night of consuming alcohol before, that she had never vomited as much on previous occasions, etc. She may not directly, or indirectly, speculate that she may have consumed substances other than alcoholic beverages without without actual evidence of the presence of such substances.

2. The state's motion as to the defendant's personal history is overruled.

3. The state's motion as to "prejudicial" terms (Filing 25) is overruled.

4. By agreement, the defendant's motion as to reference to the prior trial (Filing 26) is sustained.

BY THE COURT:

_____

Jeffre Cheuvront
Distrrict Judge